IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9390 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMANBHAI GABUBHAI SANSI

Versus

EI KALASHAVA

Appearance:

MR DF AMIN for Petitioner

GOVERNMENT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE B.C.PATEL

Date of decision: 10/03/2000

ORAL JUDGEMENT

The detenu detained under the provisions contained in the Gujarat Prevention of Anti-Social Activities, 1985 (hereinafter referred as the "PASA Act") by an order dated 13.8.99 made by the District Magistrate, Dahod, has filed this petition challenging the order of detention annexed at Annexure A to the petition. The grounds of detention served on the detenu are placed on record at Annexure B dated 13.8.99. Reading the grounds of detention, the following facts emerge.

2. The detenu was found in the habit of importing foreign liquor illegally and keeping the same without pass or permit as also selling prohibited liquor. With a view to continue the nefarious activities, the detenu was administering threat with dire consequences to the innocent people. The detenu was found in the habit of chasing innocent women visiting the hospital known as Urban Bank Hospital situated in Dahod. On account of these activities, there was no safety of females visiting the hospital without any escort. The Detaining Authority has pointed out that there were seven cases pending against the detenu. The details of which are as under:-

1. On 16.12.95, offences punishable under Section 66(B) and 65(E) of the Bombay Prohibition Act were registered vide CR No. 310/95 as he was found in possession of 10 litres of country made liquor.

2. An offence was registered against the detenu on 11.2.96 vide CR No.48/96 for an offence punishable under Section 65(b) of the Bombay Prohibition Act. He was found in possession without pass or permit wash weighing 40 kg for the purpose of manufacturing country liquor. The case is pending against the detenu and is released on bail.

3. An offence was registered on 14.7.96 vide C.R.No.268/96 for offences punishable under Section 66-B, 65-A, 116-B and 81 of the Bombay Prohibition Act. The detenu was found in possession of 4 beer bottles at his house without bail by the Court.

4. FIR was lodged against the detenu on 22.9.96 vide CR No. 350/96 for offences punishable under Section 66-B, 65-A, 116-B and 81 of the Bombay Prohibition Act. He was found in possession of foreign liquor bottles 528 in number valued at Rs.31680/- without pass or permit. The detenu has been released on bail by the Court.

5. On 9.3.1997, FIR was registered against the detenu vide CR 80/97 for the offences punishable under Section 66-B, 65-A, 116-B and 81 of the Bombay Prohibition Act. He was found transporting foreign liquor bottles 1056 in number in a jeep bearing GJ-20-A.38 without pass or permit. Thus the petitioner was found transporting liquor worth Rs.36960/- in a

vehicle. The detenu was produced before the Court and he was released on bail.

6. On 21.9.98, FIR was lodged against the detenu being CR No.200/98 for offences punishable under Section 66-B, 65-A & 116-B of the Bombay Prohibition Act. He was found in his residential premises with possession of 4 bottles of beer without pass or permit. The Court released the detenu on bail.

7. On 6.6.1999 FIR was lodged against the detenu vide C.R.No. 111/99 for offences punishable under the provisions of Section 66-B, 65-A and 116-B of the Bombay Prohibition Act. He was found in possession of 8 boxes of liquor containing 96 bottles valued at Rs.11,520/- without pass or permit. The detenu was produced before the Magistrate and he was released on bail.

3. The Detaining Authority was satisfied that despite the fact that there is a prohibition in the State of Gujarat, the detenu by committing offences under the Bombay Prohibition Act was bringing illicit liquor illegaly and by keeping the same without pass or permit was selling the same. The Detaining Authority found him as a bootlegger. It is also indicated in the grounds of detention that on account of terror of the detenu the witnesses were not coming forward to disclose the details. However, on assurance being given by the Detaining Authority, they have made statements before the Police with a condition that their identity shall not be disclosed. The Detaining Authority was satisfied that the apprehension in the mind of witnesses was genuine and therefore the names and details of witnesses were not disclosed to the detenu. It is also indicated in the grounds of detention that the activities of the detenu were prejudicial and the activities of the detenu has affected adversely or was likely to affect adversely the maintenance of the public order. The Apex Court in case of Kanuji S Jhala Vs. State of Gujarat reported in 1993(2) GLH Pg.415 has taken a view that when the Detaining Authority has specifically mentioned in the grounds that the activity of the detenu was likely to cause harm to the public health and that by itself is sufficient to affect adversely the public order as defined by the Act. In the instant case, the Detaining Authority was subjectively satisfied on account of the activities of the detenu which have been enumerated above and the activities of the detenu were likely to cause

harm to the public health and that by itself can be said to be sufficient affecting adversely the public order as defined by the Act.

4. It is also required to be borne in mind that Article 47 of the Constitution mandates the State to raise level of nutrition and standard of living of its people and also mandates the State to improve the health of the people. Article 47 of the Constitution reads as under:-

> "47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

The State should not wait till a person misuses even the medicinal preparation containing alcohol for intoxication. In the aforesaid Article, there is a reference to the prohibition of intoxicating drinks and drugs which are injurious to health. It is required to be noted that for the purpose of enforcement of prohibition even the medicinal preparation containing high percentage of alcohol are restricted. Therefore when a person is dealing in prohibited liquor the State is also required to see that the public health is affected or not and that is an important aspect to be kept in mind. The moment the authority has arrived at a subjective satisfaction that on account of activities of detenu the Public health is likely to be affected then by itself would be sufficient to amount to affect adversely the public order as defined by the Act.

5. Mr.Patel therefore submitted that in the instant case the Detaining Authority arrived at a subjective satisfaction considering the facts that 7 cases were registered against the detenu indicating that he is involved in nefarious activities strictly prohibited under the Bombay Prohibition Act and that the public health is likely to be adversely affected. The Detaining Authority has arrived at a subjective satisfaction on the basis of material placed before it and therefore the order of detention cannot be disturbed.

6. It is required to be noted that during this session while hearing similar matters, I have found in various matters that the detenu indulging in such nefarious activities though prosecuted have continued to carry on alleged illegal activities by committing alleged offence punishable under the provisions contained in the Bombay Prohibition Act. Section 65 of the Bombay Prohibition Act reads as under:-

"65. Whoever, in contravention of the provisions of this Act, or of any rule, regulation or order made or of any licence, pass, permit or authorization granted thereunder-

(a) imports or exports any intoxicant or hemp,
(b) manufactures any intoxicant,
(c) constructs or works any distillery or brewery.
(d) bottles liquor,
(e) sells or buys any intoxicant or hemp or
(f) uses, keeps or has in his possession any materials, still, utensils, implements or apparatus for the purpose of manufacturing any intoxicant.
(g) cultivates or collects hemp,

shall on conviction, be punished for each such offence with imprisonment for a term which may extend to three years and also with fine;

Provided that, in the absence of special and adequate reasons to the contrary to be mentioned in the judgement of the Court, -

(i) for a first offence, such imprisonment shall not be less than five hundred rupees;

(ii) for a second offence, such imprisonment shall not be less than nine months, and fine shall not be less than one thousand rupees;

(iii) for a third or subsequent offences, such imprisonment shall not be less than one year and fine shall not be less than one thousand rupees.

The offence under Section 65 is a non-bailable

offence which is clear from Section 119 of the Bombay Prohibition Act. Thus when a person is arrested for having committed a breach of the provisions contained in Section 65 of the Bombay Prohibition Act is required to be produced before the Magistrate and the Magistrate on being satisfied, has to release the accused on bail. The Legislature has provided higher punishment in case of a crime being repeated. Considering the fact that the activities of bootlegger affects not only the health of people but has disturbed many families, the Court only after examining record should pass an order. It is high time for the State not to be satisfied only by passing an order of detention against the detenu and get satisfied by keeping the detenu in jail for some time. If at the initial stage, when the detenu as an accused is produced before the Magistrate and if it is pointed out that the detenu-accused indulged in such activities in past and has repeated the crime again and again then the Court has to consider that aspect while passing an order under Section 437 of the Code while releasing the accused on bail.

7. It is required to be noted that while granting bail, the Court is required to consider the nature and gravity of the circumstances in which the offence is committed, the position and the status of the accused with reference to the victim and the witness, likelihood of the accused fleeing from justice, of repeating the offence, of jeoparding his own life being faced with a grim prospect of conviction in the case, of tampering with witness, history of the case as well as of its investigation. It is also required to be noted that it is the duty of the State to point out to the Court that if the detenu-accused is released on bail and if thereby he continues his nefarious activities in dealing in prohibited liquor will not only disturb several families but will also affect the health of the people in general. In case of prohibition this aspect is surely required to be taken into consideration. The Court may at the first instance consider the case in a different manner but if the prosecution is in a position to point out that the accused-detenu is indulging in nefarious activities continuously and has not restrained himself despite launching of the prosecution then certainly it would be the duty of the Court to consider that aspect while considering the application for bail.

The Court which has released the accused alleged to have committed an offence on bail, can direct such person to be arrested. Thus the law contemplates that if the accused is on bail, subsequently court can be moved

by an appropriate application pointing out that the accused is indulging in nefarious activities despite the bail order and bail order may be cancelled and the detenu may be committed to the custody. Before releasing if it is brought to the notice of the Court that the crime of a similar nature is repeated, the Court has to consider the aspect i.e. affecting public heaalth and public order. The Court should not grant bail application mechanically. It may happen that the accused might be operating from different places. In such cases past of the accused may not be known to the Investigating Officer. Even investigating officers being frequently transferred, the fact of earlier involvement may not be known to the Investigating Officer of the same police station. Therefore, when prejudicial activities of the detenu is likely to affect the health of the people and consequently public order, the Detaining Authority may adopt the course of exercising the powers under the Act.

8. In the instant case, Mr.Patel, Ld. APP appearing for the State submitted that in the grounds of detention the Detaining Authority has considered the fact that the activities of the detenu are such which cannot be controlled by applying common law. The Detaining Authority was also satisfied that the procedure which is to be followed is likely to take some time and in the meanwhile if the detenu continues such activities, the same may affect adversely. It may not be in the interest of Public and in the interest of the health of the Public at large to keep such persons at large. Thus, the Authority was aware that procedure to be followed for cancellation of bail is likely to take some time. It is known that the Court has to issue the notice to the accused who is released on bail and thereafter the application is to be heard for cancellation of bail. It is also known that powers to be exercised in so far as granting bail and cancellation of bail are concerned both are different. It is required to be noted at this juncture that the Apex Court has pointed out that principle in number of cases. In the case of Daulatram Vs. State of Haryana reported in 1995(1) SCC Page 349. The Apex Court held as under:-

"That rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative

and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the Court, on the basis of material placed on the record of the case, possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."

The Apex Court in the case of Gurucharan Singh Vs. State, AIR 1977 SC 179 has pointed out that the question of cancellation of bail under Section 439(2) is certainly different from admission to bail under Section 439(1).

The Detaining Authority was aware that following the general procedure is likely to take time from disengaging the detenu from nefarious activities, the Detaining Authority may exercise the powers under the Act. Ultimately the subjective satisfaction of the Detaining Authority is required to be taken into consideration. When it is specifically mentioned in the detention order itself, it is difficult to accept the contention raised by the Learned Counsel that the Detaining Authority was not aware about the fact that the application could have been made under Section 437(5) of the Criminal Procedure Code or Higher Court can be moved for cancellation of bail. If the procedure for cancellation of bail is likely to take longer period and the detenu is required to be restrained from acting in any manner prejudicial to the maintenance of peace, law and order and is required to restrain from causing harm to the public health, the detaining authority may exercise the powers under the Act. Reading the grounds of detention it is clear that detaining authority was aware that the procedure of detaining the detenu under Section 437 or under Section 439 of the Cr.P.C. is likely to take longer period, and if detenu is not detained immediately, detenu is likely to continue activities, the detaining authority on being satisfied exercised the discretion and that subjective satisfaction cannot be said to have been vitiated. When the aspect was specifically considered it cannot be said that the

subjective satisfaction is vitiated. It is in view of the specific reason given in the grounds of detention, it is not possible to agree with the submission made by the Learned Counsel.

9. It is required to be noted that in the instant case, the offences were registered in the same police station. When the detenu was produced before the Magistrate, the Investigating Officer, if assisted by the Public Prosecutor could have pointed out to the Court the fact that the accused has not restrained his activities and has continued to indulge in nefarious activities should not be granted bail. It is the duty of the Court to consider the fact that the person was released on bail though prima facie he was indulging in nefarious activities which was likely to cause harm to the public health and thereby affecting adversly the public order. The Court is required to keep that aspect in mind. While releasing the accused on bail, the Court has also to take into consideration the activities of the accused which is in the nature of repeating offences apart from the activities likely to cause harm to the public health. It is for the State Government to see that when the accused are produced before the Magistrate, the police officers and the Public Prosecutors are properly instructed in the matter and the correct facts are placed before the Court. In the instant case, it appears from the bail applications that the Public Prosecutor was not heard when the accused was produced before the Magistrate. Normally public prosecutor is not heard in such cases which is highly impproper. As the accused is to be produced before the Magistrate within 24 hours from the time of arrest, it is not always necessary that during working hours of the Court, accused is produced before the Magistrate. Thus on several occassions orders releasing the accused on bail are passed mechanically in such cases. The detenu is required to be detained so as to see that by nefarious activities of the detenue which are likely to cause harm to the public health, it is proper to detain the detenu on the ground of nefarious activities. If this action is taken atleast the detenu could be restrained from acting in such manner which is prejudicial to the health of the people. The detaining authority, Investigating Officer, Asstt. Public Prosecutor and the Court all are acting independently. The Investigating Officer having no record with him may not be in a position to place before the Court the record to show to the Court about the activities of the detenu. Similarly, Asstt. PUblic Prosecutor, acting under the instructions of the Investigating Officer may not be armed with past history. The Court not being informed

about the involvement of the accused may release the accused on bail. The Detaining Authority on collecting material may consider it proper to exercise the powers under the Act. The ommission on the part of Investigating Officer, would not entitle the detenu to contend that as the Investigation Officer has failed in pointing out to the Court, the impugned order is bad.

10. Learned Advocate has placed reliance on the decision of this Court delivered by the Division Bench in LPA No.1056/99 and in SCA 8056/1998 for urging that the order of detention does not disclose that any action was taken for cancellation of bail which was granted by a competent court and that despite of such an action, the detenu continued his anti-social activities. The Learned Counsel places reliance on the judgement delivered by this Court in the case of Zubedabibi Rasidkhan Pathan Vs. State of Gujarat & Ors reported in 36(2) GLR Pg. 1134. In that case, the detenu was enlarged on bail and there was non-consideration on the part of the Detaining Authority as to whether any action was taken to get the bail cancelled. In the instant case, as pointed out earlier that the Detaining Authority was of the opinion that if the detenu is not immediately detained than his continued activities will adversely affect the health of the public and would also adversely affect the law and order situation. The Detaining Authority was mindful of the fact that for restraining the detenu, if an application is made under the General Law, same is likely to take some time and till that the time the detenu may continue his nefarious activities which may cause harm to the public health and that by itself is sufficient to amount to affect adversely the public order as defined by the Act. Thus the decision does not assist the Counsel.

11. Learned Counsel submitted that in the instant case representation was made on 30.9.1999 and the same is not decided at the earliest. From the grounds of memo of application, it is very clear that the Government took about 6 days time to consider the representation whereas the District Magistrate took about 14 days to consider the representation. In view of this, Learned Counsel submitted that there is great delay in considering the representation. Ld. Counsel appearing for the State drew the attention of the Court to a reported decision of the Apex Court in the case of Smt.Kamlabai Vs. Commissioner of Police, Nagpur reported in JT 1993 3 SC 666. The detenu was detained under the provisions contained under the National Security Act by an order dated 1.5.1992. In that case the detenu made a representation on 11.5.92 to the Advisory Board and

requested the Jail Authorities to send a copy to the State Government and the Central Government. In Para 3 of the judgement, the Apex Court has pointed out the facts, in so far as the representation is concerned:-

"3. The other ground urged is that there was delay in the Central Government considering the representation. In the counter-affidavit filed in the court below, it is stated that the representation was dated 11.5.92 and it was received in the Department on 14.5.92 and later it was sent to the Home Minister and reply was given to the detenu on 26.5.92. So far as the State Government is concerned there is no delay. Now coming to the consideration by the Central Government it is stated in the affidavit that the Government of India sent a wireless message on 19.5.92 asking certain information and the information was sent on 21.5.92 and again a wireless message was given on 13.7.92 and on 15.7.92 the matter was concluded by the Government of India. The submission is that from 18.6.92 to 13.7.92 no explanation has been given regarding the delay.

4. The delay by itself is not a ground which proves to be fatal, if there is an explanation. However, the short delay can not be given undue importance having regard to the administrative actions. We do not think that the delay in this case is so inordinate as to warrant interference."

Ld. APP submitted that there was no explanation from 18.6.92 to 13.7.92 as argued by the Counsel for the detenu. The Apex Court has pointed out that delay is not a ground which proves to be fatal if there is an explanation. In the instant case, Mr.Soni, Ld. Counsel for the detenu submitted that there is no explanation whatsoever. In a given case, there may be delay of a period of 1 month or in a given case there may be delay of 1 week. In the earlier case it may not be fatal but in the later case it may be fatal. It depends upon the nature of explanation rendered. Against this Ld. Counsel for the State Mr.D.N.Patel has stated that the Apex Court has pointed out that there was no explanation between the period between 18.6.92 to 13.7.92. In the instant case as mentioned in the memo of application that the State Government within 6 days time decided the representation. In the instant case, the State Government has taken six days to decide the

representation. There is no affidavit filed by the State of Gujarat. Mr.Patel, Ld. AGP submitted that in view of the decision in the case of Smt.Kamlabai (Supra), it cannot be said that there is any delay. From the statute Mr.Patel pointed out that within a period of 3 weeks from the date of detention, the case is to be placed before the Advisory Board constituted under Section 10 of the Act and in any case before the case was placed before the Advisory Board the decision was taken. It appears that the decision is taken within six days time and thereforeit cannot be said to be fatal. Ld. Advocate Mr.Soni submitted that no doubt the decision was taken within a period of six days, however the same was not communicated to the detenu.

Learned Counsel submitted that the detaining authority decided the representation on 14th day. As there was delay in considering the representation by the detaining authority, the detenu is required to be released on this ground. It may be noted that much before the decision taken by the detaining authority, the State government considered the representation and rejected the same.

That apart in the instant case, the district Magistrate exercised the powers as conferred under the Act. Under sub-section (3) of Section 3 of the Act, the authorised Officer has to forthwith report to the State Government together with the grounds on which the order has been made and such other particulars as, in his opinion have a bearing on the matter. Section 9(1) of the Act is the relevant section with regard to affording an opportunity of making a representation against the order to the State Government. The said provision reads as under:-

"Sec 9 - Grounds of order of detention to be disclosed to detenu - (1) When a person is detained in pursuance of a detention order the authority making the order shall, as soon as may be but not latter than seven days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the State Government.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose."

Thus in view of this specific provision contained in sub-section ((1) of Section 9 of the Act which requires that the detaining authority shall afford earliest opportunity to make a representation against the order of detention not to the detaining authority exercising the powers as the authorised officer under the Act, but, to the appropriate government. Reading Section 9(1) it is clear that the appropriate government has to consider the representation. In the instant case, the representation having been considered by the State Government it cannot be said that there was contravention of the provisions contained in article 22(5) of the Constitution of India or there was failure to consider the representation. Conjoint reading of Article 22(5) of the Constitution of India and Section 9(1) of the act, the authorised officer was not required to consider the representation but it was for the appropriate government to consider the representation.

In the instant case, the appropriate authority has considered the representation. The detenu forwarded representation simutaneously to the State Government as well as the detaining authority, viz. authorised officer. As stated above, under Section 9(1) of the Act provision is made for representation against the preventive detention. The representation contemplated by article 22(5) of the Constitution and sec. 9(1) of the Act can be made to the State Government, and not to the detaiining authority, viz. the authorised officer. In the instant case, the representation is considered by the appropriate government. Therefore, there is no question of prejudice if the representation has been considered by the detaining authority, viz. authorised officer 7 days thereafter. It may be noted that it is not the case of the detenu that representation which was forwarded to the authorised officer was not a representation as contemplated under Article 22(5) of the Constitution and that it was an application for revocation of the order. Application for revocation of the order and representation against the detention order, both are different.

It is not the case of the detenu that the approval was not made by the State Government within the period prescribed i.e. within 12 days. As the order is approved by the State Government, detaining authoirty has no power to revoke the order of detention. The general power of revocation was conferred only on the State Government. Thus, after the approval of the detention order authorised officer has no express or general power to revoke, rescind or modify the order. It is only the

State Government which has power to revoke rescind or modify the order.

12. Mr.Soni, Ld. Counsel has relied upon the decision of the Apex Court in the case of Harish Pahwa Vs. State of U.P. AIR 1981 SC 1126. The Apex Court pointed as under:-

> "We would emphasise that it is the duty of the State to proceed to determine representations of the character above mentioned with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu."

Relying on the last portion, Ld. Counsel submitted that mere taking decision is not sufficient but it is required to be communicated to the detenu within a reasonable period. In the instant case, the Jail Authority has communicated the decision on 1.11.99 almost after a period of about 24 days. There is no explanation as to why the decision was not communicated to the detenu at the earliest. It must be noted that representation has been considered without delay. It must be noted that in case of Smt.Kamlabai (Supra) the Court considered delay aspect and pointed out that short delay cannot be given importance. Hence the contention is rejected.

13. Ld. Counsel submitted that certain papers supplied to the detenu are illegible. He requested the Ld. APP to read certain orders supplied to the detenu. Mr.Patel fairly stated that the copies of the orders passed by the Court supplied to the detenu are not legible. Under the circumstances, only on that ground this petition is required to be allowed. It is required to be noted that the Detaining Authority is required to supply the legible copies of the documents. In the instant case as legible copies are not supplied, the detention order is required to be quashed and therefore the petition succeeds on that ground only. The application is allowed. Rule made absolute. No order as to costs.

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